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ARTICLE

Foucault's "German Moment": Genealogy of a Disjuncture

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ABSTRACT: Foucault's lectures from early 1979 on the German Ordo-liberals are typically taken to comprise his most comprehensive account of why Germany is important for understanding neo-liberal governmentality more broadly. This paper argues, to the contrary, that the 1979 lectures actually obscure a potentially more complete account of German, neo-liberal governmentality Foucault had begun to sketch in 1977. To support this reading and to offer an explanation of why Foucault would have decided to alter his presentation of West German neo-liberalism, the paper undertakes a genealogy of Foucault's involvement with West German political issues in 1977 and 1978. The core claims that structure the argument are as follows: (1) Key aspects of the "security state" that Foucault began to work out in 1977, must have been at least partly modeled on West German "militant" or "battle-ready" democracy; (2) Yet, in his 1979 lectures, there is no longer any trace of these repressive, extralegal dimensions; (3) This shift was motivated to a significant extent by his 1977 disagreement with Deleuze, Guattari, and others over whether the West German state of the late 1970s could be considered "fascist." This concern to contest the accusation of fascism is carried forward in his 1979 lectures in a critique of "state phobia."

Keywords: Foucault, West Germany, fascism, security state, militant democracy, state phobia.

Michel Foucault repeatedly asserted that 20th century Germany held important keys to understanding modern, neo-liberal governmentality. Since the translation and publication of his 1978-1979 lecture course at the Collège de France, we appear to have a full explanation of this claim. For three full lecture periods and scattered discussions in the remaining nine lectures from this year, Foucault goes into great detail regarding the economic logic of government followed by Ludwig Erhard in the postwar years and the blueprints for neo-liberal policy developed by Walter Eucken Alfred Müller-Armack, Fritz Böhm, Walter Rüstow, and others more or less closely associated with the Freiburg School of Ordo-liberals from the 1930s through to the 1950s.¹ These ideas form a core element of Foucault's entire analysis of neo-liberalism. Indeed, despite their limited effectivity in post-war West Germany itself, he asserts

¹ Michel Foucault, *The Birth of Biopolitics: Lectures at the Collège de France 1978-1979*, translated by Graham Burchell (New York: Palgrave Macmillan, 2008), 75-158.

that the basic principles of an economic form of government spun out by the Freiburg School capture core features of other historically and geographically specific variants of neo-liberal governmentality as well.² In other words, the Ordo-liberals form a central touchstone for the much commented shift in Foucault's analytics of power relations from the repressive-agonistic model of the early- to mid-1970s, toward an understanding of the conduct of conduct and security in terms of governmentality.³

This paper argues that the 1979 lectures actually obscure rather than explain a previous, equally important, but less often discussed stage of Foucault's analysis of neo-liberal governmentality. This stage was closely tied to his 1977 involvement in attempts to prevent the French state from extraditing the radical attorney Klaus Croissant to West Germany. German authorities sought Croissant for aiding and abetting the Red Army Fraction (or RAF, dubbed the "Baader-Meinhof Gang" in the mainstream media), and he had fled to France, seeking political asylum.⁴ Foucault was among the intellectuals who sought (in vain) to prevent Croissant's extradition back to West Germany in November of 1977. Subsequently, Foucault visited West Berlin in December of 1977, and returned in January of 1978 to take part in a conference (the TUNIX congress) organized by the West German alternative left. The purpose of TUNIX was to explore possibilities for, and exchange experiences of, new forms of resistance to mainstream social, political, and economic life in the Federal Republic.⁵ It was during these months that he began to unfold a dimension in his analysis of the neo-liberal state that focused upon highly repressive, sometimes illegal state actions.

David Macey's excellent biography of Foucault contains the beginnings of an argument for the importance of the Croissant affair and 1970s, West German politics in Foucault's thinking, as do Thomas Lemke's exhaustive overview of Foucault's political writings, Michel Senellart's contextualization of Foucault's lecture courses from the late 1970s, and Michael Hardt's brief but intriguing review of the same lecture courses.⁶ There seems to be general agreement among these commentators that, as Michel Senellart puts it:

² Ibid., 106-109, 144-145. On the complex relationship between the Ordo-liberals and other strands of neo-liberalism within and outside Germany, see Jamie Peck, *Constructions of Neo-liberal Reason* (Oxford: Oxford University Press, 2010).

³ Part Two of Thomas Lemke, *Eine Kritik der politischen Vernunft: Foucaults Analyse der modernen Gouvernementalität [A Critique of Political Reason: Foucault's Analysis of Modern Governmentality]* (Hamburg: Argument Verlag, 1997), is the most comprehensive and detailed existing account of this shift.

⁴ David Macey, *The Lives of Michel Foucault* (New York: Pantheon, 1993), 392-395; Michel Senellart, "Course context," in Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France 1977-1978*, translated by Gordon Burchell (New York: Palgrave Macmillan, 2007), 372-374.

⁵ Macey, 397-399; Sabine von Dirke, "All Power to the Imagination": the West German Counter-culture from the Student Movement to the Greens (Lincoln: University of Nebraska Press, 1997), 111-120.

⁶ Macey, 392-399; Lemke, 191-193; Senellart; Michael Hardt, "Militant life," *New Left Review*, vol. 64 (August 2010), 153-154; see also Mitchell Dean, *Governmentality: Power and Rule in Modern Societies*, 2nd edition (London: Sage, 2009), 6.

The Croissant affair underscored the importance of the "German question" in Foucault's political reflection. ...Hence the long expositions in the 1979 lectures devoted to the "German model," through the analysis of post-war Ordo-liberal thought.⁷

Likewise, Lemke claims that "Foucault's lectures from 1978 and 1979 stood under the sign of the highpoint of left extremist violence in Europe," with the Croissant affair "showing, for Foucault, ...the other side of th[e] "security society"."⁸

There is, however, a serious elision or short-circuiting covered over by Senellart's "hence" and by Lemke's implied claim that extremist violence helps explain the 1979 lectures. In fact, there is a substantial gap or disjuncture between the blueprint for a neo-liberal state that emerges from Foucault's long discussion of Ordo-liberal theory in 1979 and the earlier account of the 1970s West German "security state" Foucault gives in his interventions on the Croissant affair in 1977. He identifies the West German state as "neo-liberal" in both cases and, in both cases, argues that this neo-liberal state is concerned with "security." Yet the two analyses of neo-liberal state activities are markedly different. In particular, his account of the Ordo-liberal template for a successful neo-liberal state—worked out in the mid-20th century—is completely free of any anticipation of the repressive, but likewise purportedly neo-liberal, actions of West German authorities in the context of the struggle with domestic terrorism in the late 1970s. In the 1977 interventions, Foucault clearly includes repressive extra-legal police measures in the toolkit of the neoliberal state; in the 1979 lectures, he portrays neoliberal state action as involving only indirect regulation by means of economic policy. This paper is an attempt to explain the lack of connection between the two accounts.

The first main section of the paper will consist in a review of the so-called "German Autumn of 1977" and the concept of "militant" or "battle-ready" democracy, so central to understanding West German state actions during this period. As it sets the context for the rest of the argument, this initial section must go into some historical detail. The next section chronicles Foucault's involvement in the Croissant affair and his visit to West Berlin in January of 1978, showing how these experiences, and in particular the idea of battle-ready democracy, formed an important background to theorizing the "security state." The claim is not that West German events were the only source of inspiration, merely that they were in all likelihood very significant. In particular, German events informed those aspects of Foucault's evolving analysis of neo-liberalism that concerned state actions outside the law. The third section discusses the subsequent absence of key features in this notion of the security state from his longer 1979-account of German neo-liberalism, an absence not fully explained by the different historical reference periods. The fourth section suggests that this overly strict separation between his two analyses of neo-liberalism is best explained in terms of Foucault's disagreement with other French intellectuals in 1977 and 1978 over whether the West German state in the late 1970s could be described as fascist. This question of fascism, and Foucault's related discussions of what he would call "state phobia," forms something like an unacknowledged pivot between the 1977 and the 1979 analyses of neo-liberalism, a point of commonality around

⁷ Senellart, 373.

⁸ Lemke, 192 (note 51).

which he performs a shift in emphasis. The concluding section draws together the claims made in the main body of the paper and suggests some implications.

The "German Autumn of 1977" and Militant Democracy

The aftermath of the student movement in the Federal Republic of Germany was a divergence of paths for different groups of younger adults.⁹ For most former student radicals, the experiences gathered in political mobilizations, participatory discussions, new collective living arrangements, and new lifestyles permanently transformed subsequent stages of life. However, this altered rather than ended individual engagement with mainstream institutions. For a few, the experiences of the 1960s inspired projects aimed at turning away from mainstream, capitalist society, so as to build alternatives. For a tiny minority, however, the 1960s had above all demonstrated the need for armed revolt. The Red Army Fraction (RAF), the Movement of the 2nd of June, and a number of other violent extremist groups were the eventual fruits of this third and most desperate response to the struggles of the 1960s. The RAF would become iconic because of its charismatic leaders and the high-profile struggle it succeeded in maintaining against West German authorities through the mid-1970s.¹⁰

In 1971, celebrated radical journalist Ulrike Meinhof and accomplices freed Andreas Baader, who was serving time for arson, from custody. This was a carefully planned action that nevertheless led to the fatal shooting of a security guard. Baader and Meinhof, together with Gudrun Ensslin, Jan-Carl Raspe, Holger Meins, and a shifting cast of others went underground to form the RAF.¹¹ Although these leaders from the "first generation" were all either captured or killed by authorities by the end of 1972, the "second generation" continued a deadly string of bombings and shootings for the next five years. The iconic, jailed leaders and followers who were still at large remained in sporadic contact. All the while, the West German federal state, in cooperation with the individual states or *Länder*, invested a great deal of effort and personnel in searching out and capturing or killing extremists. In the late summer and autumn of 1977, the running struggle between the RAF and West German state agencies reached its bloody crescendo. The second-generation RAF sought to force the West German government to release those RAF members (Baader, Ensslin, Raspe, Irmgard Möller and others) still held in custody. This goal was pursued through the murders of Chief Federal Prosecutor Siegfried Buback and Dresdner Bank chief Jürgen Ponto, followed by the kidnapping of Hans-Martin Schleyer, head of the German Business Association, in the Autumn of 1977, as well as the hijacking of a Lufthansa passenger jet in cooperation with Palestinian insurgents. Meinhof had already died in her cell in an apparent suicide in 1976, and Meins had died after a long hunger strike. As with earlier actions by the RAF, the Movement of the 2nd of June, and other extremist groups, the murders, kidnappings and hijackings were also aimed at provo-

⁹ Andrei Markovitz and Philip Gorski, *The German Left: Red, Green and Beyond* (Oxford: Oxford University Press, 1993). Gerd Koenen, *Das rote Jahrzehnt: Unsere kleine deutsche Kulturrevolution* [*The Red Decade: Our Little German Cultural Revolution*] (Köln: Kiepenheuer und Witsch, 2001).

¹⁰ Stefan Aust, *Der Baader Meinhof Komplex* [*The Baader-Meinhof Complex*], expanded and updated edition (Munich: Goldmann Verlag, 2008).

¹¹ The overview provided here of the historical course of events is distilled from Aust and Willi Winkler, *Die Geschichte der RAF* [*The History of the RAF*] (Reinbek bei Hamburg: Rowohlt, 2008).

king West German authorities to take massive repressive action, and thus (or so it was hoped) to "out" the state as proto-fascist, thereby alienating large swathes of the mainstream population.

The Lufthansa hijacking was foiled at the airfield in Mogadishu, Somalia, when the GSG9, a special unit of the West German security forces, freed the passengers and killed all but one of the hijackers. The next morning, October 18th, 1977, Baader, Ensslin, and Raspe were found dead in their cells, Möller, badly injured. These appeared to be suicides or suicide attempts, and most studies treat them as such.¹² In the final denouement to the German Autumn of 1977, Hans-Martin Schleyer was driven away from the Cologne high-rise in which he had been held captive, shot by his captors, and his body left in the trunk of a car near the Belgian border. Armed extremist groups would continue to stage occasional deadly attacks over the subsequent decades, but the scale and public profile of these later stages of the struggle would never again match the German Autumn.

The harsh measures implemented by West German state agencies, both in general and specifically against RAF prisoners, and the particular issue of how imprisoned leaders kept in touch with their comrades still at large, are important elements in the context of the Croissant Affair that so exercised Foucault. Although the vast majority of West Germans, and most people on the West German left, rejected the violent tactics of the RAF, the larger strategy of provocation pursued by the RAF and other groups was to some extent successful. Not only the harsh conditions of incarceration in Stammheim, but also a series of other repressive measures through the mid-1970s, had in fact gone some way toward making especially younger West Germans feel less like respected citizens than suspicious "security risks." The most infamous of these measures included a 1972 "Decree against radicals" issued by the Conference of State Interior Ministers, which required background checks of all applicants for state employment, and employment bans [*Berufsverbote*] for individuals who had been members of "anti-constitutional organizations" (i.e. violent extremist groups). The insertion of Paragraph 129a into the Federal Criminal Code made association with such organizations a punishable offense, whether or not the individual had been involved in any of its activities. The ongoing clandestine activities of federal and state Constitutional Protection Agencies [*Verfassungsschutz*], were singled out by many on the left, since they appeared to imply a thoroughgoing criminalization of protest and dissent. The Decree against radicals in fact led to the lifelong exclusion of between one and two thousand chiefly leftist activists from state jobs in professions such as teaching, and occasioned the convening of the Third International Russell Tribunal in West Germany in 1978, which condemned these repressive practices.¹³

¹² This conclusion (as with Meinhof's earlier death) is still contested by some on the basis of a record of quite extreme conditions of incarceration for RAF leaders in Stammheim and elsewhere. Long periods of solitary confinement, acoustic isolation to prevent communication, bans on visits from family and supporters, and force feeding of hunger strikers were in fact imposed upon RAF prisoners to an extent virtually unknown for other inmates. The authorities justified this on the grounds that incarcerated RAF leaders were quite possibly still involved in the planning and steering of violent attacks by their followers on the outside, a suspicion that was in fact well-founded.

¹³ Gerard Braunthal, *Political Loyalty & Public Service in West Germany: The 1972 Decree against Radicals and its Consequences* (Amherst: University of Massachusetts Press, 1990); Third Russell Tribunal, *Berufsverbote Con-*

During the crescendo of violence in the autumn of 1977, a range of additional emergency measures were put in place that seemed to trample upon other aspects of constitutional democracy. A "large crisis staff" [*großer Krisenstab*], including leading officials from police and security agencies as well as politicians, was assembled by Chancellor Helmut Schmidt as a response to the kidnapping of Hans-Martin Schleyer. A smaller subset of this circle—the "small crisis staff"—ultimately took over many decision-making powers normally dispersed among the individual states or divided between different levels of government. In the intensifying hunt for the hideout of Schleyer's kidnappers in the autumn of 1977, thousands of West Germans were subjected to stop-and-search actions by police, including one massive nationwide action to check tens of thousands of vehicles using the highways. The databases of the Federal Criminal Bureau, carefully assembled by its controversial chief Horst Herold, were mobilized to sort through masses of personal data in search of telltale patterns that might lead to the discovery of the hideout in which Schleyer was held captive.¹⁴ That this array of repressive measures was not merely symbolic would have become clear to Foucault at the latest in the course of his December 1977 trip to Berlin with Daniel Defert. At one point during their stay, they were suddenly surrounded by armed police and searched while leaving their hotel, having been overheard at breakfast discussing a book about RAF co-founder Ulrike Meinhof.¹⁵ This may well have been the same book that got its author, Foucault's German colleague in the anti-psychiatry movement, Peter Brückner, suspended from his university post (see below).

The special measures put in place by West German authorities also included a number of regulations specifically aimed at the defense attorneys representing Baader, Ensslin, and others in the ongoing trials in Stuttgart. Horst Mahler, who would later become an ideologue for the extreme right, Otto Schily, a future Minister of the Interior under the SPD-Green coalition in the late 1990s, and Klaus Croissant were among the most important of the like-minded attorneys representing the RAF leaders in Stammheim. Because of their public solidarity with the RAF, they soon came under suspicion of aiding and abetting the imprisoned leadership in ways that went beyond the client-attorney relationship. In particular, the attorneys were suspected of being couriers for messages passed between first-generation RAF leaders in jail and their accomplices outside. Because some of these messages had to do with plans for assassinations or kidnappings, the attorneys might well have been accessories to crimes. Klaus Croissant came under particularly intense suspicion because his law offices appeared to serve as a hub for the defense and thus likely also for the covert communication system.

demned (Nottingham: the Bertrand Russell Peace Foundation Ltd., 1978); Jack Zipes, "From *Berufsverbot* to Terrorism," *Telos*, vol. 34 (Winter 1977-78), 136-147.

¹⁴ Dieter Schenk, *Der Chef: Horst Herold und Das BKA* [*The Chief: Horst Herold and the BKA*] (Hamburg: Spiegel Buchverlag, 1998). Partly because of the fast-growing use of computer databases by police and security forces, 1977 also saw the passage of the first Federal Data Protection Law, and the birth of a nationwide privacy movement (David Flaherty, *Protecting Privacy in Surveillance Societies: the Federal Republic of Germany, Sweden, France, Canada & the United States* (Chapel Hill: University of North Carolina Press 1989)).

¹⁵ Macey, 396-397.

In West German political debates of the late 1970s, defenders of the whole ensemble of both longer-term and temporary state measures against extremists, referred to them collectively as elements of "militant" [*streitbare*] or "battle-ready" [*wehrhafte*] democracy.¹⁶ In an innocuous reading, militant democracy can be taken to mean "the limitation, by the constitution itself, of the rights of freedom guaranteed by the constitution, for its own protection."¹⁷ This concept had its origins in constitutional discussions in the immediate postwar period that led to the founding of the Federal Republic of Germany in 1949.¹⁸ The problem, as many delegates to the constitutional convention saw it, was how to establish a democracy that could not be undermined from within, that could not be dismantled using its own rules and procedures, or hollowed out by a lack of real commitment to democratic institutions on the part of state officials. Hitler's take-over of power in 1933 had proceeded by steps that were, technically at least, legal. Some provisions of the 1949 Basic Law [*Grundgesetz*] were thus explicitly aimed at preventing such developments in the future. The term for what was to be protected by militant democracy, the "free, democratic, basic order" [*freiheitliche demokratische Grundordnung*], captures the close link perceived by its defenders between order and democracy. The most basic precautionary feature of the West German (and now the German) system is that it constitutes a de-centralized, federal form of government, in which powers and responsibilities are widely distributed both functionally and geographically, as well as down the hierarchy to the individual federal states. Thus, it would be much more difficult than in 1933 for a single insurgent movement to commandeer the range of state institutions in order to yoke them all to a centrally steered political project. Another important feature of militant democracy is a ban on political parties or organizations whose goals or activities are directed against the maintenance of the "free democratic basic order."¹⁹ This provision was used in the early decades of the Federal Republic's existence to ban both communist and neo-Nazi parties.

But the concept of militant or battle-ready democracy, as it has been developed and practiced by successive administrations from the 1950s to the present, has also consistently been interpreted and performed as open-ended and flexible. New means of "defending" democracy may be invented in response to new threats, such as that of domestic terrorism. Predictably, such an expansion of repressive measures often provoked protest from the Left, at which much of it was aimed. In the 1970s, the definitions of "anti-constitutional organization"

¹⁶ Eckhard Jesse, *Streitbare Demokratie [Militant Democracy]* (Berlin: Colloquium Verlag, 1981); Wulf Schönbohm, *Verfassungsfeinde als Beamte? Die Kontroverse über die Streitbare Demokratie [Enemies of the Constitution as State Officials? The Controversy over Militant Democracy]* (Munich: Günter Olzog Verlag, 1979). I am grateful to Thomas Robinson for the suggestion that I translate "*wehrhaft*" as "battle-ready."

¹⁷ Johannes Schumm, *Streitbare Demokratie – Das Streitbarkeitsprinzip des Grundgesetzes als Antwort des Parlamentarischen Rates auf die nationalsozialistische Katastrophe [Militant Democracy – the Principle of Militancy of the Basic Law as the Answer of the Parliamentary Council to the National Socialist Catastrophe]* (Munich: GRIN Verlag, 2006), 5.

¹⁸ Ibid.; Der Niedersächsische Minister des Innern [Interior Minister of Lower Saxony], *Wehrhafte Demokratie: Verfassungsschutz in Niedersachsen [Battle-ready Democracy: Constitutional Protection in Lower Saxony]*, 2nd edition (Hannover: Der Niedersächsische Minister des Innern, 1981).

¹⁹ Grundgesetz für die Bundesrepublik Deutschland [Basic Law for the Federal Republic of Germany], 1949 and ff., Article 9, ¶2, Gesetze im Internet, <http://www.gesetze-im-internet.de/bundesrecht/gg/gesamt.pdf> [Accessed 12 November 2010].

employed by state and federal Constitutional Protection Agencies to justify their infiltration and surveillance of leftist oppositional groups was viewed by many as far too broad. In a rather crass example that seems to confirm this perception, a 1979 publication of the Interior Ministry of Lower Saxony, quickly sold out and reissued in 1981, includes in its inventory of target groups the "undogmatic" and "spontaneist" groups at the heart of the so-called "alternative" movement (see below), and opponents of atomic energy.²⁰ Especially in the latter case, the assertion that protestors generally aimed at the subversion of the "free democratic basic order" was a serious distortion.²¹ Arguably the purest expression of militant democracy was the "small crisis staff" that took over domestic security functions during the hunt for Schleyer's kidnappers. For many on the left, "battle-ready democracy" emphasized "battle," too heavily, while "democracy" was left to wither under the onslaught of state "militancy."

Foucault, the Croissant Affair, and the Federal Republic as a Security State

Against this background, the significance for Foucault of West German political struggles becomes much clearer. Matters became too hot for Klaus Croissant already in the summer of 1977, before the peak of the crisis. It seemed that an outstanding warrant for his arrest, which authorities had not acted upon since 1975, would actually be executed. He fled to France on July 11th seeking political asylum, and the West German government applied to have him extradited. On the 24th of October, six days after the RAF leaders were found dead in their cells, a French Court rendered its decision in response to the FRG's extradition request: Croissant was imprisoned and then returned to West Germany on the 16th of November. Foucault engaged with the Croissant Affair in response to what he saw as an all-too-ready solidarity on the part of French officials and the mainstream press with the West German state's view of the matter. He was very concerned that the French state would adopt the sorts of measures pioneered by its neighboring government.

As Thomas Lemke rightly observes, the Croissant Affair would have served as a clear illustration for Foucault that security could be understood to encompass not only everyday, mundane biopolitical issues such as public health or circulation of goods, but also the threats associated with emergencies.²² Crucially for the argument here, in some of his writings about the Croissant affair, Foucault discussed the West Germany of the late 1970s in terms of a "security society" governed by a "security state," which enters a "security pact" with the population.²³ The security pact offered by the state partly concerns those mundane aspects of

²⁰ Der Niedersächsische Minister des Innern, *Wehrhafte Demokratie*, 103-121.

²¹ Thomas Balistier, *Straßenprotest: Formen oppositioneller Politik in der Bundesrepublik Deutschland* [*Street Protest: Forms of Oppositional Politics in the Federal Republic of Germany*] (Münster: Westfälisches Dampfboot, 1996), 120-137.

²² Lemke, 191-192 [note 51].

²³ Michel Foucault, "Michel Foucault: die Sicherheit und der Staat," in Michel Foucault, *Schriften in vier Bänden (Dits et Écrits)*, vol. 3 1976-1979, translated by Michael Bischoff, Hans-Dieter Gondek, Hermann Kocyba and Jens Schröder (Frankfurt: Suhrkamp, 2003), 498-499. All passages from Foucault's interventions in the latter half of 1977 translated from this German edition of *Dits et Écrits* by the author. All translations from other German sources also by the author unless otherwise indicated.

security researched by Foucault's collaborators François Ewald, Daniel Defert, and Robert Castel:²⁴

"I offer you security." Security against insecurities, accidents, damage, risks of every sort. You are ill? Then I will give you health insurance. You have no work? I arrange for unemployment insurance. There is a flood catastrophe? I establish an assistance fund. There are criminals? I arrange for their re-education and good police surveillance.²⁵

What Foucault emphasizes in this and other interventions in 1977 however, is the possibility that the state fulfills its side of the security pact in part through *exceptional, extra-legal* means:

A state that guarantees security across the board always has to intervene when the normal course of everyday life is interrupted by an unusual, singular event. Then the law is no longer enough. Then interventions are necessary that, despite their extraordinary, extralegal character, will not appear to be arbitrary [acts] or abuses of power, but rather an expression of care: "You see how much we are doing to protect you, for as soon as anything extraordinary happens, we intervene with all available means, naturally without respecting old customs such as laws and court decisions."²⁶

Thus, as Lemke puts it, the security pact produces a foundational ambivalence with respect to the rule of law:

In order to be able to guarantee security, the state has to be able to move against and outside the framework of legality. The abuses, illegalities and irregularities of the state are not unavoidable deviations or the divergence between ideal and reality, but rather constitute the basis and guarantee of the continued and regular existence of the "Rule of Law" [*Rechtsstaat*]. In this perspective such insecurities and threats [as domestic terrorism] produce an everyday, average level of anxiety. For Foucault, the "anxiety state" thus becomes the other side of the "legal state."²⁷

While the work of Ewald and others is clearly the reference for most of the everyday forms of security Foucault discusses, this additional, strong emphasis on exceptional, extra-legal measures must be understood in the context of the Croissant affair. Foucault's first written intervention on the Croissant affair, a long piece in *Le Nouvel Observateur* published just days before Croissant was extradited, approached the issue by discussing the genealogy of asylum and extradition practices.²⁸ He notes that, during the course of the 19th and then the 20th century, rights of asylum grew more protective of asylum seekers, and tended to place an increasing

²⁴ Robert Castel, "From dangerousness to risk," in Graham Burchell, Colin Gordon, Peter Miller (eds.), *The Foucault Effect: Studies in Governmentality* (Chicago: University of Chicago Press, 1991), 281-298; Daniel Defert, "'Popular life' and insurance technology," in Burchell, Gordon and Miller, *The Foucault Effect*, 211-234; François Ewald, "Insurance and risk," in Burchell, Gordon and Miller, *The Foucault Effect*, 197-210.

²⁵ Foucault, "Michel Foucault: die Sicherheit und der Staat," 498.

²⁶ Ibid., 498-499.

²⁷ Lemke, 192 [note 51].

²⁸ Michel Foucault, "Wird Klaus Croissant ausgeliefert?" in Foucault, *Schriften in vier Bänden*, vol. 3, 1976-1979, 468-474.

burden of proof upon states seeking extradition to show that they were not attempting to pursue political opponents. Contemporaneously with this evolution, Foucault argues, the typical definition of victims of political persecution shifted away from the image of political opponents of a regime seeking eventually to take over power. Instead, the new figure was that of the "eternal dissident," one who does not seek power but who simply "no longer wishes to be governed, or at least not here, by these [authorities]." ²⁹ As part of this right not to be so governed, Foucault asserts in particular the right to sympathetic and supportive attorneys: "It is exactly this right that [the authorities] want to deny the group around Baader, by persecuting their attorneys." ³⁰ In agreeing to extradite Croissant, then, Foucault portrayed the French state as abetting a West German security state operating outside the modern legal tradition of asylum and overriding attorney-client privilege. A French state willing to do that was perforce itself in danger of becoming a full security state.

The aggressive activities of the West German security state also form the key context for the TUNIX congress Foucault attended from the 27th to the 29th of January 1978, at the Technical University in West Berlin. This was a gathering organized by alternative groups from around the *Bundesrepublik*. The name "TUNIX" translates most directly as a colloquial version of the imperative "do nothing," and was intended, at least in part, to express opposition to the West German "performance society" [*Leistungsgesellschaft*], which had produced the "economic miracle" of the 1950s and 1960s. TUNIX attracted some 20,000 people, to the surprise of organizers as well as observers. ³¹ The more specific rationale for organizing the TUNIX congress was, in Sabine von Dirke's account, threefold: first, it was an attempt to address what was felt to be a general identity crisis on the West German left brought about by the spiral of violence that had reached such a crisis in late 1977; second, in connection with this, TUNIX organizers hoped to encourage a critical reassessment of left strategies of opposition to the socio-political situation in the FRG; and third, the meeting was conceived as an opportunity for "self-assertion and mutual encouragement on the part of the alternative culture." ³² The TUNIX programme covered various dimensions and experiments of alternative politics: communication and alternative media, educational alternatives, urban planning and neighborhood activism, anti-psychiatry, anti-nuclear power, green issues, feminism and ecology, minority rights, the political significance of alternative bars to the left "scene," and a session on "transvestitism and rhizomatics" (along with Foucault, Félix Guattari was in attendance). In addition, there were some issues more specific to the repressive policies of the West German security state, such as employment bans against attorneys; a session in support of radical printers who had been jailed for publishing supposedly subversive material; a session, prompted by the mainstream press's capitulation to state directives during the Schleyer

²⁹ Ibid., 470-473.

³⁰ Ibid., 473.

³¹ Dieter Rucht, "Das alternative Milieu in der Bundesrepublik: Ursprünge, Infrastruktur und Nachwirkungen," in Sven Reichardt and Detlef Siegfried (eds.), *Das alternative Milieu: anti-bürgerlicher Lebensstil und linke Politik in der Bundesrepublik Deutschland und Europa 1968-1983* [*The Alternative Milieu: Anti-Bourgeois Lifestyle and Left Politics in the Federal Republic of Germany and Europe 1968-1983*] (Göttingen: Wallstein Verlag, 2010), 62.

³² von Dirke, "All Power to the Imagination," 111-112.

kidnapping, on the prospects for founding a national left-wing daily newspaper; and a discussion of the so-called "Mescalero" affair.³³

The Mescalero affair represented perhaps the most intense crystallization of the identity crisis on the West German left that prompted the TUNIX congress. After the first of the three high-profile murders that culminated in the German Autumn, the killing of Chief Federal Prosecutor Siegfried Buback in April of 1977, an anonymously authored obituary appeared in a student newspaper in Göttingen and was circulated widely. The author, writing for a group that identified themselves only as the "Mescaleros," admitted feeling a certain "clandestine joy" [*klammheimliche Freude*] at the news of the murder, but then reported a subsequent change of mind, concluding finally that violence of this sort was wrong as well as strategically unwise. The mainstream press in West Germany, however, ignored the larger point of the article and fastened onto the phrase "clandestine joy." Politicians from the established parties, along with many commentators and pundits, believed this phrase finally gave them a glimpse into the most basic emotional orientation they suspected was shared, not just by a few extremists, but also by wide sectors of West German alternative culture. Conservatives especially sought to paint the entire alternative movement as a collection of RAF "sympathizers." In effect, they suggested that much of the extra-parliamentary left should be treated as enemies of the constitutional order.³⁴ As will become clearer below, the Mescalero affair was important for Foucault as a further illustration of security states' ability to criminalize dissent.

Foucault's hosts at TUNIX were Heidi Paris and Peter Gente, whose alternative publishing house Merve brought out the first German translations of Foucault's writings in the 1970s, and with whom he remained friends until his death.³⁵ While in West Berlin, Foucault tried to avoid assuming the mantle of the great intellectual at center stage, taking part in the official programme only in a workshop on anti-psychiatry.³⁶ In his biography of Foucault, David Macey claims that "[n]othing specific emerged from the TUNIX gathering, but Foucault enjoyed the experience." He "reveled in the ambience and engaged in informal discussions and arguments with these members of the counterculture."³⁷ To the contrary, I would like to argue that something did emerge. What Foucault learned at TUNIX from the perspective of the demonized extra-parliamentary left reinforced his interest in militant or battle-ready democracy as a model for his concept of the security state, and offered him an array of concrete

³³ Anon, TUNIX-Programme (1978), Einestages: Zeitgeschichte auf Spiegel Online (http://einestages.spiegel.de/static/document/7648/tunix_programm.html?d=IMAGE%2CSPON_VIDEO%2CPDF&o=original_publicationdate-DESCENDING&s=624&r=24&of=9&z=24&cp=26&c=1) [Accessed 12th November 2010]; Autorenkollektiv, "Zum Tango gehören immer zwei, wenn ich gehe, kommst du mit!," in Dieter Hoffmann-Axthelm, Otto Kallscheuer, Eberhard Knödler-Bunte and Brigitte Wartmann (eds.), *Zwei Kulturen? TUNIX, Mescalero und die Folgen* [*Two Cultures? TUNIX, Mescalero and the Consequences*] (Berlin: Ästhetik und Kommunikation Verlag, 1978), 125-148.

³⁴ von Dirke, "All Power to the Imagination"; Rucht, "Das alternative Milieu in der Bundesrepublik."

³⁵ Uta Liebmann Schaub, "Foucault, alternative presses, and alternative ideology in West Germany: a report," *German Studies Review*, vol. 12, No. 1 (February 1989), 139-153.

³⁶ TUNIX Programme.

³⁷ Macey, 397.

examples through which to grapple with the question of appropriate and effective resistance to it. Foucault was searching during this period for new and different ways not only to think about the neoliberal security state but also to discover appropriate modes of resistance to it.³⁸ He had already attended a general forum in September of 1977 organized by *Le Nouvel Observateur* and the journal *Faire*, dedicated, similarly, to discussing left experiments in new forms of politics and organization in the areas of education, medicine, urban planning, workplace politics, environmental protection and communication.³⁹ (The passages in his 1982 essay "The Subject and Power" that discuss resistance can be read without much difficulty as essentially a commentary on the 1977 French and 1978 German alternative conferences).⁴⁰ I will argue below that the TUNIX congress had a more specific impact on Foucault's thinking connected to the issue of fascism. But in order to see why this issue proved so pivotal for Foucault, it is necessary first to review subsequent transformations in his account of West German neo-liberalism.

The 1979 Lectures on German Neo-liberalism and the Issue of Fascism

The 1979 lectures should contain further clarification of what is meant by the "security state," if, as Senellart and others have maintained, Foucault's involvement with the Croissant affair explains his long discussion of West German neo-liberalism in the 1979 lecture course. However, these expectations are comprehensively disappointed. Some of the key logics of security analyzed by Foucault in his contemporary interventions in 1977 have no place in his 1979 account of earlier neo-liberal discourse. We can recognize this truncation or elision at two different levels. First and most obviously, the four full 1979 lectures and additional brief discussions concerning West German neo-liberalism do not contain a single, even passing direct reference to any of the repressive state interventions associated with the Croissant affair or militant democracy. That there would not be *much* overlap is fully understandable: the 1977 writings refer to events in that year, while the 1979 lectures refer to a founding, neo-liberal discourse taking place decades earlier. However, there should be at least some hint in the 1979 lectures of how the Ordo-liberal discourse that informed Adenauer's and Erhard's policies in the 1950s and 1960s could eventually connect with the harder-edged, Schmidt-era West German neo-liberalism, if Foucault's interest in events of the late 1970s explains his later lectures on the Freiburg School.

The disjunction is even starker than that, however. The peculiar absence from the 1979 lectures of any reference to the possibility of repressive state activities is not merely an empirical fact. Foucault also emphasizes the rationale, in the Ordo-liberal vision, for the positive *exclusion* of repressive measures from the palette of acceptable neo-liberal state activities, by way of an extended discussion of the distinction between Rule of Law [*Rechtsstaat*] and police state [*Polizeistaat*] traditions. Foucault stresses the allegiance of Ordo-liberal theorists to the former, the *Rechtsstaat* tradition, which insists that decisions of public authorities be anchored

³⁸ Senellart.

³⁹ Michel Foucault, "Eine kulturelle Mobilmachung," in Foucault, *Schriften in vier Bänden*, vol. 3, 1976-1979, 430.

⁴⁰ Michel Foucault, "The Subject and Power," in Hubert Dreyfus and Paul Rabinow (eds.), *Michel Foucault: Beyond Structuralism and Hermeneutics* (Chicago: University of Chicago Press, 1982), 208-228.

in the law or legal code, and which also distinguishes clearly between the general validity of laws, on the one hand, and the contingent validity of decisions taken by authorities, on the other. The *Rechtsstaat* is opposed both to "despotism," in which the will of the sovereign is the source of all authority, and to the *Polizeistaat* tradition:

in which there is no difference of kind, origin, validity, and consequently of effect, between, on the one hand, ...the law—and on the other hand, the conjunctural, temporary, local, and individual decisions of public authorities—if you like, the level of rules and regulations.⁴¹

Foucault asserts further on in the same lecture that:

if there really is a German model, it is not the frequently invoked model of the all-powerful state, of the police state, which, as you know, has so frightened our compatriots. The German model being diffused is not the police state; it is the rule of law.⁴²

Seen against the background of Foucault's interventions in the Croissant affair, this claim constitutes a major shift. As noted above, the security state he had discussed in 1977, although explicitly cast as neo-liberal, in fact displays key features of the police state, chiefly its implicitly accepted right to act outside the law. Especially the "crisis staffs" that assumed effective control of state activity in the *Bundesrepublik* for a short period in the autumn of 1977 operated precisely by absorbing the authority of law into the authority of contingent decisions taken by state officials. During the search for Hans-Martin Schleyer, these few state officials acquired something close to total control, not only of the state apparatus, but also of mainstream public discourse, successfully requesting a media black-out during the final days before the Lufthansa hostages were freed. Arguably, the activities of the West German Constitutional Protection Agencies or the Federal Criminal Bureau during the late 1970s likewise fused legal and regulatory sources of authority to the point of indistinguishability, though in a less spectacular and visible way. Many, though not all, of the measures taken in the 1970s were given a patina of legality. However it was clearly not the law that was driving state action, but rather the reverse. Such extralegal action is not foreseen in Foucault's portrayal of the *Rechtsstaat* tradition. Thus, it is not unfair to say that the picture of neo-liberal governmentality Foucault presents in 1979 is narrower than that offered in 1977. The part truncated is precisely the part that would allow Foucault's ideas to be recognized as highly relevant to the security regimes of the early 21st century. Why was this part not only dropped but also excluded in principle from Foucault's 1979 discussion of German neo-liberalism?

To answer this question, we need to return once again to the Croissant affair and TUNIX. In November 1977, just as Croissant was about to be delivered back to the Federal Republic, Félix Guattari circulated a petition among prominent French intellectuals opposing the extradition. Despite his agreement with the political goal of the petition, Foucault refused to sign it, because he objected to the characterization of West Germany in the text of the petition as "fascist." According to David Macey, "Foucault was prepared to fight for Croissant's

⁴¹ Foucault, *Birth of Biopolitics*, 168.

⁴² *Ibid.*, 179.

right to asylum, but he would not lend his name to any statement which lent support to a thesis associated with the Red Army Fraction itself."⁴³ This helped precipitate a permanent break with Deleuze whose views on the matter were very similar to Guattari's.⁴⁴ It also constituted an important aspect of the broader shift in Foucault's analysis of power relations from an "agonistic" model to one centered upon the government of subjectivities. For Foucault had in fact previously *endorsed* the view that a chief concern of the contemporary left should be to identify new forms of fascism, for example in this intervention from a 1975 conference:

I think that what has happened since 1960 is characterized by the appearance of new forms of fascism, new forms of fascist consciousness, new forms of description of fascism, and new forms of the fight against fascism. And, the role of the intellectual, since the sixties, has been precisely ...to situate him or herself in such a way as to both make apparent forms of fascism which are unfortunately not recognized, or too easily tolerated, to describe them, to try to render them intolerable, and to define the specific form of struggle that can be undertaken against fascism.⁴⁵

His preface to Deleuze and Guattari's 1977 book *Anti-Oedipus* also praises this as a work of opposition to current forms of fascism.⁴⁶ Thus, it is perhaps not surprising that Deleuze would have been affronted.

Macey's account of Foucault's new position in late 1977 suggests a categorical, moral refusal of the fascist label as a justification for extremist violence. The claim I would like to make is that he now considered the label "fascist" *analytically* inappropriate for the West German state, because it obscured the differentiation that should be made between fascism and the more recent neo-liberal security state he was in the process of theorizing.⁴⁷ Again, this security state, in its West German form at least, was capable of quite draconian, even violent extra-legal measures. Spectacular violence itself, however, should be seen as part of its toolkit and not as a telltale symptom of fascism. Thus, in his interview with *Tribune socialiste*, he insists that it is misleading and unwise for the left to label liberal democratic states of the late 1970s "fascist":

We can in any case trust the political consciousness of the people. If you say to them, "You live in a fascistic state and don't even know it," then they know very well that you're lying. If one says to them, "Never before was freedom so limited and under threat as it is today," then they know that this claim is false. If one says to them, "New Hitlers are taking the stage and you don't notice it," they know this isn't true. If, on the other hand, you speak with them about their real experiences, about their disconcerted, worried relationship to the mechanisms of security—for example to the foreseeable effects of a completely medicalized

⁴³ Macey, 394.

⁴⁴ Senellart, 393 [note 26].

⁴⁵ Michel Foucault, "Schizo-Culture: on prisons and psychiatry," in Michel Foucault, *Foucault Live: Collected Interviews, 1961-1984*, edited by Sylvère Lotringer (New York: Semiotext(e), 1996), 179.

⁴⁶ Michel Foucault, "Preface to *Anti-Oedipus*," in Gilles Deleuze and Félix Guattari, *Anti-Oedipus: Capitalism and Schizophrenia* (Minneapolis, University of Minnesota Press, 1983), xi-xiv.

⁴⁷ Hardt, "Militant life", 154.

society or to the results of a social security based upon total surveillance—then they sense very precisely, they know, that it is not a matter of fascism but of something new.⁴⁸

Foucault's rejection of the accusation of fascism would also have been reinforced in a specific way by his experiences at the TUNIX congress, where he found common ground with a prominent German colleague. One of the most controversial fallouts of the Mescalero obituary that formed such a central point of reference for TUNIX concerned Peter Brückner, a prominent professor of psychology at Hannover University and a key spokesperson of the anti-psychiatry movement in West Germany. Brückner indeed shared the podium with Foucault in the anti-psychiatry session in Berlin. Brückner felt the divergence between mainstream and alternative political cultures in West Germany was growing intolerable, as it seemed by that time to preclude any constructive dialogue. Nevertheless, he sought to keep hopes for such a dialogue alive. In 1977 he had brought out a controversial book, in which he republished some of RAF co-founder Ulrike Meinhof's writings and explored the psychological dynamics that could have led her to analyses of West German society which justified violent extremism.⁴⁹ This book may in fact have been the one Foucault and Defert were discussing when the West Berlin police searched them in December of 1977 (see above). The book is interesting in the present context because Brückner, like Foucault, was concerned with refuting the charge that West Germany was fascist in the late 1970s. Unlike Foucault, Brückner takes a psycho-analytic approach, tracking what he sees as the gradual dissolution of Meinhof's sense of proportion and reality during her years as an underground militant and then in high-security prisons. He argues that the isolation from social life experienced by Meinhof and her companions led to a "disappearance of place and time":

This disappearance of place and time, as though imperialism had really swallowed up the life-space [*Lebensgelände*] of social processes (and with it the "places," the topography of everyday being-in-the-world), [had] torn the people from the temporality of their lives, is expressed and dealt with by Ulrike M. Meinhof—and by other comrades—as an essential and communicable inner experience...⁵⁰

Being the evocative writer that she was, Meinhof was able not only to communicate this experience, but also to persuade some readers that it served as an adequate description of their circumstances. Yet, like Foucault in his argument against the wording of the petition circulated by Guattari, Brückner considered the label of fascism simply inappropriate as a description of West German society. He insisted that, despite the undeniable and increasingly intense repression, "nevertheless the people live (including those who do not struggle), and many live happily."⁵¹

⁴⁸ Foucault, "Michel Foucault: die Sicherheit und der Staat," 500-501.

⁴⁹ Peter Brückner, *Ulrike Meinhof und die deutsche Verhältnisse* [*Ulrike Meinhof and the German Situation*], 2nd edition (Berlin: Wagenbach, 2001 [1977]).

⁵⁰ *Ibid.*, 172.

⁵¹ *Ibid.*, 170.

Brückner had earned the scorn and hatred of RAF leaders Ensslin and Baader for this book. Indeed, they tried to block its publication from their cells in Stammheim.⁵² Having made bitter enemies on the extremist left, Brückner now found himself, as a result of the Mescalero affair, a pariah in the eyes of the mainstream and the right as well. For helping to republish the Mescalero obituary he was suspended from his university post in Hannover. After the TUNIX congress, Foucault stopped in Hannover on his way back to France to take part in a demonstration against Brückner's suspension.⁵³ Later, he would write the foreword to the French translation of Brückner's 1972 book: *Enemies of the State*.⁵⁴ It may not be a coincidence that Foucault, who "had marched through the cold streets of Hannover in solidarity with Brückner,"⁵⁵ began his lecture at the Collège de France on 8th of February, a little over a week after returning from Berlin, by apologizing for having contracted the flu, and cut the same lecture short at the end with the admission, "I feel really lousy."⁵⁶ In any event, it is highly probable that Foucault's contact with Brückner, and the understanding he had gained of how Brückner's plight fit into the context of West German domestic struggles in the late 1970s, played an important role in cementing his conviction that calling the state in the *Bundesrepublik* "fascist" was inappropriate and potentially dangerous. In any case, the two thinkers occupied roughly parallel positions on this question in their respective national left cultures.

Again, one of the chief occasions for the present argument is that there is no explicit mention of the Croissant affair, the TUNIX congress or, more generally, of the extra-legal possibilities of the security state in Foucault's 1979 lectures. The one crucial and indirect connection, a connection that holds the key to the entire puzzle, is precisely this issue of fascism. Without explicit mention of events of the 1970s, Foucault's argument against over-eager accusations of fascism is actually the only element of the framework for his 1977 analysis of the neo-liberal state carried forward and deepened in the 1979 lectures. In the course of this development, Foucault constructs a set of conceptual coordinates which appear to imply that his later lectures are also able to account for the kinds of repressive measures typical of West German militant or battle-ready democracy. I want to suggest that this indirect and implicit accounting is not convincing.

The entire span of 1979 lectures covering West German neo-liberalism is quite precisely bookended, on the 31st of January and then on the 7th of March, by two installments of a critique of the fascism thesis in terms of what Foucault calls "state phobia."⁵⁷ In the latter lecture, Foucault claims that one of his two main reasons for "dwelling on these problems of neo-liberalism" for so long was a matter of "critical morality," a concern to counter leftist

⁵² Klaus Wagenbach, "Nachwort," in Brückner, *Ulrike Meinhof und die deutsche Verhältnisse*, 192-197; see also Macey, 398.

⁵³ Ibid.

⁵⁴ Michel Foucault, "Vorwort von Michel Foucault," in Foucault, *Schriften in vier Bänden*, vol. 3 1976-1979, 906-907.

⁵⁵ Macey, 398.

⁵⁶ Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France 1977-1978*, translated by Graham Burchell (New York: Palgrave Macmillan, 2007), 115, 129.

⁵⁷ Foucault, *Birth of Biopolitics*, 75-80, 186-188.

preoccupation with "the unlimited growth of the state, its omnipotence, its bureaucratic development, the seeds of fascism it contains, the state's inherent violence beneath its social welfare paternalism..."⁵⁸ Foucault defines state phobia as a view of the state which sees it as inherently expansionary with respect to civil society, and which perceives:

a kinship, a sort of genetic continuity or evolutionary implication between different forms of the state, with the administrative state, the welfare state, the bureaucratic state, the fascist state, and the totalitarian state all being... the successive branches of one and the same great tree of state control in its continuous and unified expansion.⁵⁹

In this profligate discourse, "an analysis of social security and the administrative apparatus on which it rests ends up, via some slippages and thanks to some plays on words, referring us to the analysis of concentration camps."⁶⁰ What sorts of state activities could mislead analysts into such conceptual slippages? One of Foucault's main points throughout these lectures is to show that although the Ordo-liberals spun out a strong critique of state planning, neo-liberal governmentality is not to be confused with the laissez faire approach of classical liberalism, but in fact calls for, "permanent vigilance, activity, and intervention."⁶¹ Neo-liberal interventions, in Foucault's paraphrase, have to do with indirect economic measures to ensure price stability, and with educational policy, demographic policy, inheritance law, in short, a "set of technical, scientific, legal, geographic, let's say, broadly, social factors" whose regulation is necessary to put in place the framework for economic competition to function properly.⁶²

Thus, on the one hand, neo-liberal discourse is state-phobic, but on the other, it calls for continual intervention by the state. Foucault seems to be implying here that the kinds of repressive state action he witnessed in the context of the Croissant affair, fall somewhere within the category of neo-liberal state interventionism and therefore do not warrant the "slippery slope" thinking that ends up assigning them to the category of fascism. Yet neo-liberal interventionism, as he describes it in 1979, is all about stabilizing economic functions, not about struggles against domestic terrorism. When he asserts that "[t]he welfare state has neither the same form, of course, nor, it seems to me, the same root or origin as the totalitarian state, as the Nazi, fascist, or Stalinist state," Foucault implicitly suggests that this welfare state is all that is needed to understand the West German Autumn of 1977.⁶³ To wrap up his critique of state phobia and the fascism accusation, Foucault argues that the "inflationary" critique of the state:

does not carry out a criticism or analysis of itself. That is to say, it does not seek to know the real source of this kind of anti-state suspicion, this state phobia. ...Now it seems to me—and this is why I have laid such stress on the neo-liberalism of 1930-1950—that this kind of

⁵⁸ *Ibid.*, 186-187.

⁵⁹ *Ibid.*, 187.

⁶⁰ *Ibid.*, 187-188.

⁶¹ *Ibid.*, 133.

⁶² *Ibid.*, 141.

⁶³ *Ibid.*, 190.

analysis, this critique of the state, ...is effectively, completely, and already very clearly formulated in the years 1930-1945.⁶⁴

Although he does not name them, Foucault thus implies here that Deleuze, Guattari, and the other signers of the 1977 petition against Croissant's extradition failed to recognize that their position on the West German state could itself be located in the tradition of the state phobia that was an important pillar of the neo-liberal problematization of government.⁶⁵

This critique of the fascism accusation, as an instance of state phobia, leaves Foucault's account of West German neo-liberalism incomplete and disjointed. First, in 1977 he had categorized the repressive activities of the West German state as "neo-liberal"; then, in 1979, he criticized the discourse of state phobia, and implicitly, the accusation that the West German state in 1977 was "fascist," as itself an animating feature or central motif of neo-liberalism. The dilemma facing Foucault was that, on the one hand, he could not explicitly banish repressive, extra-legal state action from his definition of neo-liberalism without inviting the assertion that, if such action was not neo-liberal, then it was after all fascistic. On the other hand, he could not so easily incorporate extra-legal repression into an analysis of neo-liberalism based upon the writings of the Freiburg School, which were strongly focused upon indirect forms of government and explicitly rejected extra-legal state actions. My suggestion is that Foucault's solution was *simply to fall silent* on repressive modalities of neo-liberalism in 1979, leaving them to inhabit an ambiguous conceptual gap between a "normal," neo-liberal interventionism for which they were too strong and a fascism to which they were insufficiently central. Again, it was easy not to mention extra-legal, state actions in a strictly historical account of the Ordo-liberal discourse, but in scrupulously avoiding any hints as to how this "pure" vision of neo-liberal governance could be reconciled with the likewise purportedly neo-liberal actions of the West German state apparatus in 1977, Foucault left behind an incomplete, internally unreconciled picture of German neo-liberalism.

Conclusions

Alongside the undeniable analytical gains attending Foucault's shift from a repressive-agonistic to a governmental analysis of modern power, there is, in short, also a hitherto insufficiently acknowledged loss. The entire argument up to this point has been aimed at providing a genealogical background for understanding this loss. The trappings of West German, militant democracy developed in the 1970s (the "Order against radicals," Paragraph 129a of the Criminal Code, and especially the "crisis staffs" called into being by the Schmidt government in late 1977), probably provided the immediate model for Foucault's definition of a security state that commits itself, even to the point of transgressing the law, to a security pact with the population. Contrary to Foucault's later conflation of "post-war German neo-liberalism" tout court with "the contemporary neo-liberalism that actually involves us," such repressive state actions are not necessarily or presumptively elements of a policy designed to allow the operation of market competition.⁶⁶ They are also not examples of security in the

⁶⁴ Ibid., 188-189.

⁶⁵ Ibid., 69.

⁶⁶ Ibid., 101.

mundane sense of "insurance," as analysed by François Ewald, Daniel Defert, and Robert Castel in their collaborations with Foucault on governmentality.⁶⁷ Foucault ceased even to mention such repressive state activities in his genealogy of neo-liberalism, however, not simply because mid-20th century neo-liberal theory was not the same thing as 1970s neo-liberal practice, nor because he necessarily came to see them as less relevant to neo-liberalism. Rather, I suggest, he fell silent for more expedient "rhetorical" reasons, because continuing to emphasize repressive state actions would have made it more difficult to recognize the validity of rejecting the label of "fascism" for West Germany in the late 1970s. A picture of neo-liberalism cleansed of repressive measures was more difficult to confuse with fascism. Yet this picture was fundamentally incomplete.

The lack of clarity on what changed in Foucault's position regarding neo-liberalism has led to subsequent confusion among commentators on his use of the term fascism, for example in some writings of Mark Neocleous and Kevin Thompson.⁶⁸ Echoing Deleuze and Guattari, Kevin Thompson defines fascism as a set of power relations which, though much less obtrusively than during the 1930s, "continue to cultivate a temperament disposing us to want our own subjection."⁶⁹ These relations are, to follow the present reconstruction of Foucault's implicit logic, better understood as neo-liberal, in the broad sense that includes not only "everyday" neo-liberalism, but also the more exceptional trappings of the security state. In particular, the security pact Foucault perceived as a core part of the security state explains one important sense in which we are sometimes disposed to "want our own subjection," *without this disposition being describable as a result of "fascism."*

This brings us to the second, broader point I would like to address. The concept of the security state clarifies how juridical or sovereign power relations and biopolitical/governmental power relations can be articulated with each other. Indeed, the notion of a security pact more fundamental than the law is a useful way to understand precisely how emergencies or crises such as the German Autumn of 1977, can be seen analytically as vanishing points, at which rationalities of citizenship, law, and the sovereign state become articulated with those of population, biological life, and biopower. That is, the security pact is where the "city/citizen game" intersects with the "shepherd/flock game."⁷⁰ In the security pact, as Foucault described it in 1977, members of a population who understand themselves in part *as potentially vulnerable life* agree, *as potentially active democratic citizens*, to allow certain, perhaps quite blatant, transgressions of their citizenship rights by the state. The existence of something like this security pact would have been quite obvious to Foucault, as to other observers of the German Autumn of 1977, since large swathes of the West German population actively supported the repressive measures of the state, even where they were personally inconvenienced.⁷¹ Yet, as Foucault

⁶⁷ Castel, "From dangerousness to risk"; Defert, "'Popular life' and insurance technology"; Ewald, "Insurance and risk."

⁶⁸ Mark Neocleous, "Perpetual War, or 'War and War Again': Schmitt, Foucault, Fascism," *Philosophy and Social Criticism*, vol. 22 (1996), 47-66, 58-59; Kevin Thompson, "Forms of resistance: Foucault on tactical reversal and self-formation," *Continental Philosophy Review*, vol. 36 (2003), 113-138, 133-134 [note 2].

⁶⁹ Ibid., 123.

⁷⁰ Lemke, 156.

⁷¹ Markovitz and Gorski, *Red, Green and Beyond*; Aust, *Der Baader-Meinhof Komplex*.

rightly observed, such repressive reversals could only be extremely exceptional, and would only have been politically tolerable for a very short time. Furthermore, such spasms of re-assertion of repressive state power do not contradict the more general trend Foucault had noticed already in 1977, whereby the neo-liberal state in its "normal" functioning withdraws from direct government of ever more spheres of everyday life. Recurring repressive phases do, however, allow us to see that this general trend is neither simple nor inevitable. All of this raises questions about the uses made of Foucault in the writings of Giorgio Agamben, Michael Hardt, and Antonio Negri.⁷² More interpretive work clearly needs to be done on exactly how, for example, Agamben's concept of the state of emergency relates to Foucault's analysis of the security pact.

Finally, it is interesting to speculate about how the gap between the 1979 lectures and the 1977 interventions, and between normal and exceptional forms of security, stressed in this paper, might have been filled historically in Foucault's genealogical account of West German neoliberalism, had he not been so concerned with deflating the fascism accusation. The gap between Ordo-liberal principles of governance and the aggressive activities of the security state coincides with a historical gap: the period between the relatively non-coercive Erhard policies of the 1950s and 1960s, and the security state of Helmut Schmidt in the late 1970s.⁷³ This historical period witnessed the 1960s student revolts, feminist and other strands of a broad cultural revolution, a host of liberation movements in the global south, in short, a range of upheavals that leaders in the West saw as threats to the social order. The extremists of the RAF and their counterparts in other countries were only a later outgrowth of this more generally unsettling panorama. It is thus plausible to suggest that there are in effect at least two lectures "missing" from the 1979 course. In the first lecture, Foucault would have needed to clarify that the strictly economic programme of the Ordo-liberals, to rebuild the legitimacy of the post-war West German system upon economic success, was in fact accompanied from the beginning by an at least partly autonomous, if often low-profile, political logic of militant or battle-ready democracy. As Federal Chancellor in the 1960s, Erhard would try to deny the need for repressive state actions, through his vision of West Germany as a "formed society" [*formierte Gesellschaft*]. A society

...whose features are already recognizable in the system of the social market economy, forms itself not through authoritarian coercion but rather of its own accord, of its own will, on the basis of the knowledge and growing consciousness of mutual dependency. The re-

⁷² Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, translated by Daniel Heller-Roazen (Palo Alto: Stanford University Press, 1998); Michael Hardt and Antonio Negri, *Empire* (Cambridge, MA: Harvard University Press, 2000); Michael Hardt and Antonio Negri, *Multitude* (Cambridge, MA: Harvard University Press, 2004).

⁷³ Sebastian Cobler, in his *Law, Order and Politics in West Germany* (New York: Penguin Press, 1978), rightly cautions against drawing too sharp a distinction between the roiling 1960s and 1970s, on the one hand, and the era of supposed social peace preceding it. West German conservative politicians, police and security officials, as Cobler amply documents, had been aggressively seeking the restoration of sweeping repressive powers from the very earliest days of the Federal Republic, and had been suppressing most of the protest there was with a heavy hand.

sult of this formation must be a vital relationship between social stability and economic dynamism...⁷⁴

The increasingly vocal student movement of the mid-1960s rejected the idea of the *formierte Gesellschaft*, arguing that it was a recipe for conformity and a fig leaf for repression.⁷⁵ Arguably, it was the spectacular practical nullification of the harmonious vision of the *formierte Gesellschaft* in the protest movements of the late 1960s that eventually resulted in the rise to prominence of repressive battle-ready democracy in the 1970s. In short, Foucault's first "missing lecture" would have traced the incompleteness and historical faltering of the earlier, non-repressive, neo-liberal vision.

The second "missing" lecture would then have been able to show how, in the aftermath of the 1960s, militant democracy was increasingly forced to show its fangs, as it became clearer to ruling elites (and not just in the *Bundesrepublik*) that maintaining a legal and institutional framework for capitalism was by itself insufficient to ward off dangers posed to living, biological populations, or to economic prosperity by violent revolt or domestic terrorism. In other words, Foucault would likely have addressed the 1970s debates about the so-called "crisis of governability."⁷⁶ In this context, his discussion of the Walter Lippmann conference of 1939, as a crucible of early neo-liberal thought in the seventh lecture of 1979, could have been nicely complemented by a subsequent analysis of the efforts of the Trilateral Commission, starting in the 1970s, to secure the functioning of ever-more intertwined national economies against threats of unrest and revolt.⁷⁷ Connecting the 1950s Ordo-liberal version of neo-liberalism, a neo-liberalism that could still see itself as entirely within the *Rechtsstaat* tradition, to a late 1970s version that had revived and transformed elements of the *Polizeistaat* tradition, would have allowed Foucault to root a more analytically complete account of neo-liberalism in a more historically complete genealogical narrative. Subsequent developments of that narrative, for example the shifts in the meaning of "security" since September 11th, 2001, would then have had a more easily discernable place in the trajectory of Foucault's thought.⁷⁸

⁷⁴ Ludwig Erhard, Speech of the Federal Chancellor at the XIIIth CDU Party Conference, March 1965, quoted in Peter Borowsky, "Das Ende der 'Ära Adenauer'," *Informationen zur politische Bildung*, v. 258, Bundeszentrale für politische Bildung Online (http://www.bpb.de/publikationen/01642006453512595568594735924988,5,0,Das_Ende_der_%C4ra_Adenauer.html) [accessed 29.04.2011].

⁷⁵ Nick Thomas, *Protest Movements in 1960s West Germany: A Social History of Dissent and Democracy* (Oxford: Berg, 2003).

⁷⁶ Claus Offe, "Ungovernability: On the renaissance of conservative theories of crisis," translated by Andrew Buchwalter, in Jürgen Habermas (ed.), *Observations on the Spiritual Situation of the Age* (Cambridge, MA: MIT Press, 1984), 67-88.

⁷⁷ Holly Sklar, *Trilateralism. The Trilateral Commission and Elite Planning for World Management* (Boston: South End Press, 1999 [1980]).

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